Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1999 Term

MISTICK PBT,

Petitioner,

vs.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN E. BEARD, III *(Counsel of Record)*
PETER N. FLOCOS
KIRKPATRICK & LOCKHART LLP
HENRY W. OLIVER BUILDING
535 SMITHFIELD STREET
PITTSBURGH, PA 15222-2312
(412) 355-6500
Counsel for Petitioner

DECEMBER 8, 1999

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QUESTIONS PRESENTED

1. Whether the phrase "based upon" as used in 1986 Amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4), should be given its plain meaning of "derived from," in accordance with the decisions of certain United States Courts of Appeals, or instead should be interpreted to mean "supported by" or "substantially similar to," as decided by certain other United States Courts of Appeals?

2. Whether a U.S. Government response to a Freedom of Information Act ("FOIA") request constitutes an "administrative report" or an "administrative investigation" as those terms are used in § 3730(e)(4)(A), therefore barring *qui tam* actions "based upon" information obtained through the FOIA?

3. Whether a person is disqualified from being an "original source" under § 3730(e)(4)(B) when that person's *qui tam* suit is "based upon" fraudulent transactions that were publicly disclosed as a result of that person's efforts?

LIST OF PARTIES

Mistick PBT ("Mistick"), the Petitioner, brought this case against Respondents as a private relator plaintiff under the False Claims Act, *see* 31 U.S.C. 3730(b)(1), in the United States District Court for the Western District of Pennsylvania (the "District Court"). Mistick was the general contractor for two housing projects owned by Respondent Housing Authority of the City of Pittsburgh ("HACP"). Respondents Miller and Washington were officers of HACP. Respondents L. D. Astorino & Associates, Ltd. (formerly known as L. D. Astorino Architects, Inc.), Astorino Branch Environmental, Inc., Astorino Branch Engineers, Louis D. Astorino, Dennis L. Astorino, Patrick I. Branch and Bernard J. Quinn (referred to herein together as "Astorino") were the architects for the two housing projects.

Mistick also was the appellant in the United States Court of Appeals for the Third Circuit. Respondents were defendants in the District Court and appellees in the Third Circuit.

STATEMENT UNDER SUP. CT. R. 29.6

Mistick is a Pennsylvania business trust and is not a "corporation" under Pennsylvania state law. In any event, Mistick has no parent or subsidiary company ("subsidiary" being defined as ownership by Mistick of greater than 50%).

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OPINIONS BELOW

The Third Circuit opinion in *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, No. 97-3248 (Appendix A at 1a), is reported at 186 F.3d 376 (3d Cir. 1999). The order of the Third Circuit denying Mistick's Petitions for Rehearing and Rehearing En Banc (Appendix E at 92a) is not reported. The opinion of the District Court (Appendix C at 66a) is not reported.

BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on July 30, 1999. Mistick's Petitions for Rehearing and for Rehearing En Banc were denied on September 9, 1999, and this Petition for Writ of Certiorari was filed within 90 days thereafter. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994). The constitutionality of a statute is not at issue.

STATUTORY PROVISIONS INVOLVED

This Petition involves 31 U.S.C. § 3730(e)(4), which states in full:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or United States [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney

> General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the United States before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

A. Statutory Background

This case arises under the False Claims Act (the "Act"), 31 U.S.C.. §§ 3729 *et seq.* (1994), which makes unlawful the making of false statements to the United States Government ("United States" or "Government"), in order to obtain payment for a claim. A private person (known as the "relator") may bring a civil action for violation of the Act on behalf of itself and the United States (referred to as a "*qui tam*" action), and retain a portion of any damages recovered. *See id.* § 3730(b)(1), (d).[1]

Based on growing concerns regarding the frequency and amount of contractor fraud against the United States, Congress, through 1986 amendments to the False Claims

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[1] Under the Act, the Government is initially given the option of intervening in and conducting an action brought by the relator, but if the Government declines to intervene, then the relator has the right to conduct the action itself. *See* 31 U.S.C. § 3730(b)(4) (1994).

Act, substantially liberalized a jurisdictional bar applicable to *qui tam* litigants. The amended bar, which is at issue in this Petition, applies only when the relator's action is "based upon" a public disclosure of fraud in specified hearings, reports or investigations or in the news media generally. *See* 31 U.S.C. § 3730(e)(4) (1994) (set forth in full above under "Statutory Provisions Involved").

B. Factual Background

Petitioner Mistick, the relator here, was the general contractor for renovation work, including lead-based paint abatement work, performed at two public housing projects of Respondent HACP, known as the "Bedford" and "Addison" projects. *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 379 (3d Cir. 1999) (Appendix A, at 1a, 4a). Both construction projects were administered by HACP, and were financed, in part, by the United States Department of Housing and Urban Development ("HUD"). *See id.* (Appendix A, at 4a). Respondent Astorino was the architectural firm that developed for HACP the specifications for the renovation work, including lead-based paint abatement work. *See id.* (Appendix A, at 4a).

In its complaint under the Act, Mistick alleges that Respondents made false statements to HUD in 1990 and 1992, in order to obtain HUD funding for certain cost increases at the Bedford and Addison projects. *See id.* (Appendix A, at 4a). The cost increases and related false statements involved a change of the product originally specified for the lead-based paint abatement work at the Bedford and Addison projects. *See id.* at 379-381 (Appendix A, at 4a-10a).

Respondents' false statements were contained in certain letters from Respondents to HUD, and were made, at least in part, in response to written inquiries by HUD as to the basis for the specifications change. *See id.* at 380-381 (Appendix A, at 6a-10a). Those letters were discovered by Mistick in or about October 1993, pursuant to a Freedom of Information Act ("FOIA") request made by David M. Priselac, Esq., counsel for Mistick (the "Priselac FOIA Request"). *See id.* at 381 (Appendix A, at 10a). Mistick knew Respondents' statements to HUD to be false based on the knowledge Mistick had acquired while performing its contracting duties at the Bedford and Addison projects. *See id.* at 379 (Appendix A, at 4a-6a).

Mistick's knowledge of the true state of facts had formed the basis for a July 1991 Pennsylvania state court contract action brought by Mistick against HACP (the "Mistick State Action"). In the Mistick State Action, Mistick sought to recover the damages it suffered resulting from the delay and disruption caused by the lead abatement specifications change. *See id.* at 381 (Appendix A, at 8a-9a). Copies of certain of Respondents' letters to HUD, which were originally produced by HUD independently of the Mistick State Action, were also later produced by Respondents in discovery in the Mistick State Action. The Mistick State Action also uncovered additional documentary and testimonial evidence regarding the knowing falseness of Respondents' statements to HUD.

Indeed, as a matter of logic, virtually no person other than Mistick would have understood the context in which the statements were made, known that the statements

were false, or even looked for the statements in the first place.[2]

C. Proceedings Below and Basis for Jurisdiction in the District Court

Mistick filed its initial *qui tam* complaint under the Act in the District Court against Respondents on November 20, 1995, under seal as required by the Act. *See* 31 U.S.C. § 3730(b)(2) (1994).[3] As also required by the Act, Mistick provided written disclosure of substantially all material evidence and information to the United States. *See id.* The basis for federal jurisdiction in the District Court was that Mistick's claims arose under the laws of the United States, namely the Act, *see* 28 U.S.C. § 1331 (1994), and that Mistick had satisfied the foregoing information disclosure provisions of the Act.

On July 9, 1996, the District Court granted the United States' motion of election to decline intervention in this case, and ordered the complaint unsealed and served on Respondents. *See* 31 U.S.C. § 3730(b)(2), (b)(4) (1994). After service of the complaint, Respondents moved to

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[2] *See Mistick*, 186 F.3d at 399 (Becker, C.J., dissenting) ("[i]t is clear, however, that the present relator, Mistick, is nothing like the opportunistic and parasitic relator. . . . Rather, Mistick plausibly alleges (but has not had the opportunity to prove) that it learned of defendants' fraud well before it was 'publicly disclosed' in state-court litigation. . . .") (Appendix A, at 52a-53a).

[3] Prior to filing its complaint, Mistick met with the Government and voluntarily provided the information on which the allegations in this action are based. *See* 31 U.S.C. § 3730(e)(4)(B) (1994).

dismiss, which motion was granted by the District Court on March 26, 1997, solely on the basis of § 3730(e)(4).

Mistick filed its Notice of Appeal in the Third Circuit on April 23, 1997. By opinion dated July 30, 1999, a divided Third Circuit panel, over the dissent of Chief Judge Becker, affirmed the judgment of the District Court. *See Mistick*, 186 F.3d at 378-389 (Appendix A, at 1a-29a); *id.* at 389-403 (Becker, C.J., dissenting) (Appendix A, at 30a-62a). On August 13, 1999, Mistick filed Petitions for Rehearing and for Rehearing En Banc, which were denied by order dated September 9, 1999.

D. The Third Circuit Opinion

The Third Circuit panel divided in its decision essentially along the lines of division that exist among the United States Courts of Appeals. Under the panel majority view, the Mistick Action was "barred" because the action was "supported by" or "substantially similar to" publicly disclosed information and "the relator's independent knowledge of the information is irrelevant". See id. at 385-388. Under Chief Judge Becker's view, the action was not barred because, among other reasons, it was not "derived from" publicly disclosed information. *Id.* at 395.

According to the Third Circuit panel majority, both the misrepresented facts (X) and the true facts (Y) were disclosed in discovery in the Mistick State Action, and accordingly both sets of facts had been "publicly disclosed" in a "civil hearing" within the meaning of § 3730(e)(4)(A) under Third Circuit precedent. *See Mistick*, 186 F.3d at 385 (citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991)) (Appendix A, at 19a).

However, the panel majority recognized that Mistick knew both the true and misrepresented facts independently, well before republication of the same in the Mistick State Action. Mistick's original and independent knowledge was gained, as to the true set of facts, primarily as a result of Mistick's performance of its general contracting work on the Bedford and Addison projects. Mistick acquired its knowledge of the false set of facts from HUD's response to the Priselac FOIA Request. *See id.* at 379, 381, 383, 385 (Appendix A, at 5a, 6a, 9a, 10a, 13a, 19a). Accordingly, the panel majority addressed the issue of whether Mistick's *qui tam* action, in fact, was "based upon" the public disclosures within the meaning of § 3730(e)(4)(A). *See id.* at 385 (Appendix A, at 20a).

The panel majority concluded that the phrase "based upon" should be interpreted to mean "supported by" or "substantially similar to," so that "the relator's independent knowledge of the information is irrelevant." *See id.* at 385-388 (citations omitted) (Appendix A, at 20a-27a). In this connection, the panel majority expressly decided to disregard what it admitted was the plain meaning of the phrase "based upon," namely, "actually derived from." *See id.* (Appendix A, at 20a-27a). As noted by the panel majority, the interpretation of the term "based upon" as used in Section 3730(e)(4)(A) is the subject of split decisions within the federal circuits. *See id.* (Appendix A, at 20a-27a).

The panel majority also held that HUD's response to the Priselac FOIA Request, through which Mistick initially discovered Respondents' fraudulent letters to HUD, itself constituted a "public disclosure" in an "administrative report" or in an "administrative investigation," as those

terms are used by § 3730(e)(4)(A). *See id.* at 383-385 (Appendix A, at 13a-18a). The import of this holding is to bar within the Third Circuit *qui tam* actions based upon information acquired through the FOIA. This dramatic expansion of the bar to private litigants has not been addressed by any other United States Court of Appeal.[4]

Lastly, the panel majority determined that Mistick could not be an "original source" under § 3730(e)(4)(B), on the grounds that Mistick gained its knowledge of the misrepresented facts through a § 3730(e)(4)(A) public disclosure, *i.e.*, HUD's response to the Priselac FOIA Request. *See id.* at 388-389 (Appendix A, at 27a-28a). At least one other federal circuit has held that a party that causes a public disclosure is not precluded from being an original source. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970 (9th Cir. 1999).

REASONS FOR GRANTING THE PETITION

This case presents three important questions of federal law. Settlement of the questions presented is of vital importance to effectuate Congressional intent to combat fraud against the United States and to ensure that fraud against the United States is policed equally and effectively regardless of the jurisdiction in which the fraud occurs. For

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[4] In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 945 (1997), this Court did not reach the narrower question, answered affirmatively by the vacated underlying Ninth Circuit decision, of whether a response to a FOIA request constitutes a "public" disclosure.

these reasons, review on a writ of certiorari is appropriate. *See* Sup. Ct. R. 10(a) and 10(c).

By interpreting the phrase "based upon" in § 3730(e)(4)(A) to mean "substantially similar to," or "supported by," rather than according to its admitted plain meaning of "derived from," the panel majority interprets § 3730(e)(4)(A) as a bar to meritorious *qui tam* suits generated from the relator's original and independent knowledge. As stated by the Third Circuit, "the relator's independent knowledge of the information is irrelevant." *Mistick*, 186 F.3d at 385-388 (Appendix A, at 21a). The panel majority's interpretation of the "based upon" language conflicts with decisions of other United States Courts of Appeals addressing that language, making review on certiorari appropriate under Sup. Ct. R. 10(a), and with relevant decisions of this Court mandating that the *qui tam* language be given its plain and ordinary meaning, making review on certiorari appropriate under Sup. Ct. R. 10(c).

Second, the panel majority's holding that HUD's response to the Priselac FOIA Request was an "administrative report" or "administrative investigation" within the meaning of § 3730(e)(4)(A) similarly disregards the plain meaning of the statutory language. Indeed, the FOIA is not identified in or implied by the statute as a type of public disclosure to which the bar applies. The types of public disclosures identified are those in which the Government or news media are presumed to understand that a fraud has been perpetrated. Moreover, the panel majority's holding effectively prevents *qui tam* plaintiffs from using the FOIA, which is one of the most effective means of discovering or verifying a fraud that is being perpetrated on the Government. Review on certiorari is appropriate under Sup. Ct. R. 10(c).

Third, the panel majority effectively negates the "original source" provision of § 3730(e)(4)(B), under which a *qui tam* plaintiff may maintain its suit regardless of the applicability of § 3730(e)(4)(A). The panel majority creates an ambiguity where none exists in the statute, and holds circularly that where there has been a "public disclosure" of fraud under paragraph (A), then the relator cannot be an original source under paragraph (B), even though the relator itself caused the supposed public disclosure of the fraud in the first place. This interpretation stands in conflict with that of at least one other Court of Appeals, making review appropriate under Sup. Ct. R. 10(a).[5]

I. This Case Presents Important Questions of Federal Law That Should Be Settled by This Court

The split in decision among the Federal Circuit Courts is a basis alone to grant this Petition for Certiorari. Review by this Court is also merited because Congress has long viewed the *qui tam* provisions of the Act, including liberalization of the private relator bar in 1986, as vitally important to rooting out fraud against the United States. Any unduly broad interpretation of the private relator bar benefits dishonest contractors. Accordingly, it is vital that this Court address the operative language in § 3730(e)(4) at issue in this case.

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[5] Petitioner understands that recently, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, *cert. granted*, 119 S. Ct. 2391 (Jun. 24, 1999), this Court requested briefing and heard argument on the issue of whether a private person has standing to maintain a *qui tam* action.

Indeed, in a recent letter to the Attorney General of the United States, Senator Charles E. Grassley and Congressman Howard L. Berman, the principal sponsors of the 1986 amendments to the Act, sharply criticize the type of broad interpretation of § 3730(e)(4) rendered by the Third Circuit panel majority in this case, as defeating both the language and intent of Congress in drafting that provision and thereby damaging the United States' anti-fraud efforts. *See generally* Letter From Senator Charles E. Grassley and Congressman Howard L. Berman to Janet Reno, Attorney General, 145 Cong. Rec. E1540-01, E1546-01 (July 14, 1999) (the "Grassley/Berman Letter") (Appendix F, at 94a, 98a).[6]

The scale of fraud against the United States more than justifies Congress' concerns. As of 1986, estimates of the amount of fraud committed against the United States ranged from hundreds of millions to more than $50 billion per year, with the Justice Department estimating that as much as ten percent of the federal budget was being drained

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[6] This Court has considered the views of legislative sponsors in addressing interpretive issues under the Act. *See United States v. Bornstein*, 423 U.S. 303, 309 & n.5 (1976); *United States v. McNinch*, 356 U.S. at 595, 599 & n.9 (1958); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 & n.10 (1943). Indeed, this Court has explained more generally that statements from legislative sponsors are to be accorded "substantial weight" in interpreting a statute, and has also indicated that even subsequent legislative history is to be considered valid in determining the "scope and purpose of" a statute. *See FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27, 535 (1982).

due to fraud.[7] One 1996 study estimated that as much as 5% of the total federal budget is drained by fraud, and that without the deterrent effect of the Act, approximately $656 billion would have been lost due to fraud over the 1987 to 1996 period.[8] Recent General Accounting Office and other studies indicate that waste, fraud and abuse consume over $200 billion of taxpayer funds each year, and that Medicare fraud alone amounts to approximately $20 billion annually.[9]

Although the Act originally contained no restriction on private relator actions, Congress inserted a jurisdictional bar into the statute in 1943, in response to perceived abuses by "parasitic" relators who simply copied Government indictments and added no information of their own.[10] That bar, later called the "government knowledge" bar, was interpreted to prevent a *qui tam* action simply if information about the fraud was possessed in a United States file,

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[7] *See* False Claims Act Amendments of 1986, S. Rep. No. 99-345, at 3 (1986) (citations omitted), *reprinted in* 1986 U.S.C.C.A.N. at 5267-5268.

[8] William L. Stringer, *The 1986 False Claims Act Amendments: An Assessment of Economic Impact* 6-10 (1996) (Appendix G, at 119a-124a).

[9] *See* 145 Cong. Rec. H12090-01, at H12093 (Nov. 16, 1999) (statement of Rep. Sessions); *id.* E2069-01, at E2069 (Oct. 7, 1999) (statement of Rep. Lazio).

[10] *See* Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the Qui Tam Door*, 27 Pub. Cont. L.J. 669, 673-79 (1998) (citing and discussing legislative history); Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237, 240-50 (1995) (same).

regardless of whether the relator knew of the information independently or whether the United States understood the significance of the information.[11]

Indeed, in some cases, such as the Seventh Circuit's decision in *Wisconsin v. Dean*, the government knowledge bar was held to apply even where the relator itself had informed the United States of the fraud in the first place.[12] Not surprisingly, the government knowledge bar caused the number of *qui tam* actions to drop off dramatically.[13]

In 1986, Congress amended the Act to replace the government knowledge bar with the present bar of § 3730(e)(4). It is manifestly clear that, in doing so, Congress intended not merely to eradicate the government knowledge bar, but also to generally invigorate the Government's anti-fraud efforts by increasing the number of private actions. *See Hughes Aircraft*, 520 U.S. at 950 (1986 amendments "permit[] actions by an expanded universe of plaintiffs"); S. Rep. No. 99-345, at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5288-5289 (intent of 1986 amendments "to encourage more private enforcement suits"); *id.* at 24, *reprinted in* 1986 U.S.C.C.A.N. at 5289 ("much of the purpose of the *qui tam*

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[11] *See* Salcido, *supra* note 10, at 248-250 & nn.47-56 (citing and discussing cases); *see also* Grassley/Berman Letter, 145 Cong. Rec. at E1546 (Appendix F, at 100a).

[12] *See* Salcido, *supra* note 10, at 249-250 & nn.53-55 (discussing *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984)); Grassley/Berman Letter, 145 Cong. Rec. at E1546 (same) (Appendix F, at 100a).

[13] *See* Thompson, *supra* note 10, at 675 n.40; Salcido, *supra* note 10, at 258.

actions would be defeated unless the private individual is able to advance the case to litigation"); *see also id.* at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-5278 (discussing "unfortunate" interpretation of 1943 bar in *Wisconsin v. Dean*).[14]

Congress viewed increased availability of *qui tam* actions as having two related purposes. First, Congress intended to encourage those with information regarding fraud against the United States to come forward with that information. *See, e.g.*, H.R. Rep. No. 99-660, at 23 (1986) ("The purpose of the qui tam provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."); S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5266-5267 (purpose of amendments to "encourage any individual knowing of Government fraud to bring that information forward," and commenting that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds").

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[14] This Court has also recognized that, since the inception of the Act in 1863, Congress has viewed the private relator right of action as central to effectuating the Act's purposes of providing incentives for persons to bring forward information regarding fraud, spurring initiation of anti-fraud cases and adding the relator's resources to the United States' anti-fraud effort. *See Marcus*, 317 U.S. at 545-547 & nn.10 & 12; *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (describing the private relator action one of the oldest and "least expensive and most effective means of preventing fraud") (quoting *Marcus*, 317 U.S. at 541 n.5).

Second, Congress believed that more *qui tam* actions would assist (and even prod) the United States in acting against fraud. *See id.* at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273 (private relators can "make a significant impact on bolstering the Government's fraud enforcement effort"); H.R. Rep. No. 99-660, at 18 (1986), and S. Rep. No. 99-345, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5267-5268 ("[M]ost fraud goes undetected" by Government auditors); S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5269 ("most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected"); *id.* at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291 (Government may "neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason"); *id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272 (lack of adequate Government resources "perhaps the most serious problem plaguing effective enforcement" and the reason why promising information is "often left unaddressed"); *id.* at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291 ("[T]he often heavy, sporadic workload of Government attorneys may create a situation where a *qui tam* plaintiff is better able to conduct the litigation in a timely manner.").

Mistick is precisely the type of *qui tam* relator that Congress wanted to encourage via the 1986 amendments. Far from acting as a parasite, Mistick was the general contractor of the construction projects that gave rise to the false claims at issue here. Each essential element of Respondents' fraud was discovered through Mistick's own efforts. Indeed, as a result of its "insider" role, Mistick itself caused the supposed "public disclosure" of Respondents' statements, originally through the Priselac FOIA Request and later in discovery in the Mistick State Action. Mistick then brought its information regarding the

fraud to the United States and initiated this action, precisely as intended by Congress.

II. The "Based Upon" Language of § 3730(e)(4)(A) Should Be Interpreted in Accordance With Its Plain Meaning

A. The Panel Majority's Interpretation of the Phrase "Based Upon" Conflicts With Decisions of Other United States Courts of Appeals

The Third Circuit panel majority held that the phrase "based upon" in § 3730(e)(4)(A) should not be given its plain meaning of "derived from," but instead should be interpreted to mean "supported by" or "substantially similar to," so that "the relator's independent knowledge of the information is irrelevant." *See Mistick*, 186 F.3d at 385-388 (citations omitted) (Appendix A, at 20a-27a). In admittedly disregarding the plain language of the statute, the panel majority adopted the position taken by the D.C. and Ninth Circuits in interpreting the phrase "based upon" in that provision. *See id.* at 385-388 (citing *United States ex rel. Biddle v. Board of Trustees*, 161 F.3d 533 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1457 (1999), and *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997)) (Appendix A, at 21a-27a).[15]

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[15] The panel majority also cited *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), and *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). *See Mistick*, 186 F.3d at 386 (Appendix A, at 21a). However, as noted by the Fourth Circuit,

(Footnote continued next page . . .)

However, other United States Courts of Appeals have either held or strongly indicated that the phrase "based upon" in § 3730(e)(4)(A) should be interpreted according to its plain meaning, *i.e.*, as "actually derived from." *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994); *see also United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999) ("[t]he Fourth Circuit's interpretation of 'based upon' is the better on the grounds both of plain meaning and public policy," and is the "preferred" reading); *United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 40-41 (D. Mass.) (stating among other things that "[i]n light of the plain meaning of the words 'based upon,' this Court is inclined to agree with the Fourth Circuit"), *aff'd*, 62 F.3d 1411 (1st Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996).[16] Additionally, in his spirited dissent in the *Mistick* case, Chief Judge Becker of the Third Circuit also urged that the "based upon" phrase be interpreted according to its plain meaning, in accordance

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Precision and *Koch* do not truly address whether "based upon" should be interpreted to mean "derived from." *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348-1349 & n.8 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994). Conversely, although not cited by the panel majority, the Sixth Circuit also has adopted the position that "based upon" means "supported by" or substantially similar to. *See United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998) (citations omitted).

[16] In affirming the district court's opinion in *LeBlanc*, the First Circuit issued an unpublished opinion describing the district court's opinion as "well reasoned" and affirming the district court's judgment "for substantially the reasons elucidated in the opinion below." *See United States ex rel. LeBlanc v. Raytheon Co.*, No. 95-1263, 1995 WL 471105, at *1 (1st Cir. Aug. 9, 1995) (Selya, J.).

with the Fourth Circuit's approach in *Siller*. *See Mistick*, 186 F.3d at 394-400 (Becker, C.J., dissenting) (Appendix A, at 41a-56a).

B. The Panel Majority's Decision Conflicts With Decisions of This Court

The Third Circuit panel majority expressly decided to disregard what it admitted was the plain meaning of that phrase, namely, "actually derived from." *See Mistick*, 186 F.3d at 386-388 (Appendix A, at 21a-27a). In justification of this approach, and reflecting the same concerns voiced by the D.C. and Ninth Circuits, the panel majority stated that (1) the statute "does not reflect careful drafting or a precise use of language," and (2) a plain meaning interpretation of "based upon" would render the "original source" provision of § 3730(e)(4)(B) superfluous. *See id* (Appendix A, at 21a-27a). However, the panel majority's interpretive analysis directly conflicts with decisions of this Court and is plainly incorrect.

1. *Interpretive Decisions of This Court, Including Decisions Addressing the False Claims Act and "Poorly Drafted" Statutes*

This Court has warned against unduly restrictive interpretations of the *qui tam* provisions of the Act, in light of the clear historical Congressional intent to employ such actions as part of the United States' anti-fraud efforts. *See Marcus*, 317 U.S. at 540-542 & nn.4-5; *cf. United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (stating that this Court, in "various contexts," has "consistently refused" a "restrictive reading" of the reach of both the criminal and civil provisions of the False Claims Act) (citing *Marcus*). In

this context, this Court specifically has stated that fidelity must be maintained to the language chosen by Congress to describe the private relator right of action, regardless of the court's views of the desirability of such actions. *See Marcus*, 317 U.S. at 546-47 n.9.

Indeed, this Court consistently has ruled that unambiguous terms of any statute must be interpreted according to the plain, ordinary and natural meaning of the terms chosen by Congress. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *United States v. James*, 478 U.S. 597, 604 (1986); *Rubin v. United States*, 449 U.S. 424, 429-430 (1981).

In this connection, this Court has specifically rejected the suggestion, made by the Third Circuit panel majority, that supposedly poor or forgetful drafting of a statute gives a court the license to disregard the plain meaning of the terms chosen by Congress and to revise the statute. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (commenting that "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined and not for this Court"); *United States v. Locke*, 471 U.S. 84, 95 (1985) ("the fact that Congress might have acted with greater clarity or foresight does not give courts a carte blanch to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do"); *cf. Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 45-47 (1979) ("Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.'").

This Court has even gone so far as to state that the canon of plain language interpretation is the "cardinal canon before all others," and to suggest that while superfluous interpretations are "disfavored," the doctrine of avoiding superfluous interpretations may "not apply" so long as the statutory language is clear and the result is not "repugnant." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *see also id.* ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there," and that "[i]t would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation") (citations omitted).

2. *Decisions of This Court Addressing the Phrase "Based Upon" in Other Federal Law Contexts*

This Court has interpreted the phrase "based upon" according to its plain and ordinary meaning in other federal law contexts, and accordingly has favored the type of "derived from" meaning rejected by the Third Circuit panel majority. In describing the "independent source" exception to the exclusionary rule under the Fourth Amendment, this Court has stated that the United States, in order to have the evidence in question admitted, must prove that the evidence was "based upon" some source other than the illegal source. *See United States v. Wade*, 388 U.S. 218, 240 (1967) (citation omitted). Further elaborating, this Court made clear in *Wade* that such a test is keyed to whether the evidence had an "independent origin," and whether the evidence "has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 240 n.31, 241 (citations omitted).

Similarly, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this Court addressed the issue of whether a lawsuit was "based upon a commercial activity," as referred to in the Foreign Sovereign Immunities Act of 1976, and therefore permitted to be maintained against a foreign sovereign under that statute. This Court stated that "guidance is hardly necessary" to determine the meaning of that phrase, and looked to dictionary definitions to determine that meaning in the context of the issue presented. *Id.* at 355-359 (citations omitted).[17]

3. *Creation of Ambiguities Where None Exist*

This Court has cautioned that courts are not to create ambiguities, where none in fact exist, as an excuse for departing from the plain language of a statute. *See United States v. James*, 478 U.S. 597, 604-605 (1986) (admonishing against using "ingenuity to create ambiguity") (citations omitted); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984) (admonishing against "effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists"). In this case, however, the Third Circuit panel majority has done just that. Contrary to the panel

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[17] Congress, too, has used the phrase "based upon" in other statutes as meaning "derived from." The Copyright Act defines a "derivative work" as a work that is "based upon one or more preexisting works." 17 U.S.C. § 101 (1994). Authoritative treatises have characterized this definition as meaning that the derivative work is "substantially copied from a prior work." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.01, at 3-3 (1997).

majority's claim, a plain language reading of "based upon" in § 3730(3)(4)(A), to mean "derived from," does *not* render the original source provision of § 3730(e)(4)(B) superfluous.

As an initial matter, it may be more confusing than helpful to view the "original source" provision of § 3730(e)(4)(B) as an "exception" that can be rendered "superfluous" by an interpretation of § 3730(e)(4)(A). Instead, the original source provision may be a mere safe harbor, useful whenever a relator could more easily prove itself an "original source" than disprove a causal link between the public disclosures and its *qui tam* action. *See Mistick*, 186 F.3d at 400 (Becker, C.J., dissenting) (Appendix A, at 54a-55a).

In any event, the "based upon" phrase in § 3730(e)(4)(A) may be interpreted according to its plain meaning of "derived from" *without* rendering the original source provision of § 3730(e)(4)(B) superfluous, even if the latter provision is viewed as an exception to the former. The interpretive logic employed by the Third Circuit panel majority, as well as by the D.C. and Ninth Circuits, overlooks the fact that the phrase "based upon" could reasonably be interpreted to mean based "in part" upon.[18] *See Mistick*, 186 F.3d at 399 (Becker, C.J., dissenting) (Appendix A, at 53a-54a); *Precision*, 971 F.2d at 552 (holding that "an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is

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[18] As noted by the Fourth Circuit, the question of whether "based upon" means "derived from" logically precedes and is distinct from the question of whether an action based "in part" on a qualifying public disclosure counts under the statute. *See Siller*, 21 F.3d at 1349.

nonetheless 'based upon' such allegations or transactions"); *see also Farmington*, 166 F.3d at 863-864 (while reserving question of based "in part" upon, nevertheless holding that a claim "which both depends essentially upon publicly disclosed information and is actually derived from such information is 'based upon' a public disclosure").

When it is realized that the phrase "based upon" in § 3730(e)(4)(A) could mean "actually derived in part from," the supposed superfluousness of § 3730(e)(4)(B)'s original source provision vanishes. For example, suppose that Mistick derived this action partly from its own knowledge of both the true and false state of facts (X and Y), and partly from a qualifying statutory public disclosure of both those essential elements. Or, suppose that a relator independently knows of one essential element of a fraud (X or Y), but learns the rest through a news article which describes all the essential elements (X and Y). *See* Thompson, *supra* note 10, at 701-703.

In both of these cases, the relator could still be subjected to § 3730(e)(A) under a "derived from" interpretation of "based upon," but nevertheless qualify under existing case law as a § 3730(e)(4)(B) "original source." *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (relator is original source where it has direct and independent knowledge of any essential element, X or Y); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) (relator is original source where it has direct and independent knowledge of "substantive information about the particular fraud").

III. A Government Response to A FOIA Request Does Not Constitute An "Administrative Report" or "Administrative Investigation" Under the Plain Language or Intent of § 3730(e)(4)(A)

The panel majority also held that HUD's response to the Priselac FOIA Request, through which Mistick initially discovered letters containing misrepresentations to HUD, constituted a "public disclosure" in an "administrative report" or in an "administrative investigation," as those terms are used by § 3730(e)(4)(A). *See Mistick*, 186 F.3d at 383-385 (Appendix A, at 13a-18a). Significantly, however, the FOIA is nowhere mentioned or even implied in § 3730(e)(4)(A) as a kind of disclosure to which the bar applies, even though Congress could have easily added the FOIA to the list of qualifying disclosures had it so desired. Only by stretching the language of that provision well beyond its ordinary meaning is the panel majority able to conclude that a response to a FOIA request constitutes a disclosure in an "administrative report" or "administrative investigation" for purposes of § 3730(e)(4)(A).

Indeed, in addressing "public disclosure" language contained in the Consumer Product Safety Act, this Court specifically indicated that it would not view a FOIA request as falling within a statutory reference to "disclosures in the course of an administrative . . . proceeding." *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 & n.5 (1980); *id.* (Congress could have listed a FOIA request in the provision had it so intended).

The Third Circuit panel majority, however, gives the term "report" the very broad meaning of "something that gives information." *See Mistick*, 186 F.3d at 383

(Appendix A, at 15a). In fact, however, as a review of dictionary definitions reveals, the true thrust of dictionary definitions of "report" is an official or formal statement or account of facts, usually detailed and formal. *See* Black's Law Dictionary 1300 (6th ed. 1990); The American Heritage Dictionary 1049 (2d College ed. 1985); Webster's New Collegiate Dictionary 973-74 (1981).

Similarly, the panel majority also contends that an "investigation" is comparable to the very broad term "search." *See Mistick*, 186 F.3d at 384 (Appendix A, at 17a). In fact, however, as a review of dictionary definitions reveals, the true thrust of "investigation" or "investigate," as pertinent here, involves more than a mere search, instead describing patient, detailed, systematic and careful inquiry, observation or examination. *See* Black's Law Dictionary 825 (6th ed. 1990); The Compact Oxford English Dictionary 874 (2d ed. 1991); The American Heritage Dictionary 675 (2d College ed. 1985); Webster's New Collegiate Dictionary 603 (1981).

In this case, in response to the Priselac FOIA Request, HUD's only actions were that an employee of HUD in HUD's Pittsburgh Regional Office engaged in the purely ministerial acts of (1) identifying HUD's files on the Bedford and Addison projects located in that office, and (2) making those files available to Mistick for inspection and copying. Copies of Respondents' letters to HUD were the only products of the FOIA request.

Accordingly, as noted by Chief Judge Becker in his dissent, HUD's activities involved no real "investigation," nor did they involve any analysis, statement or account by HUD as would be required to come within the true sense of the term "report." *See Mistick*, 186 F.3d at 393-394

(Becker, C.J., dissenting) (Appendix A, at 40a); *see also id.* (citing applicable FOIA provisions establishing that FOIA requires only a "search," not an "investigation," and involves the actual "records" themselves, not any "report") (Appendix A, at 40a). At most, HUD's actions in this case constituted a mere "collection" or "compilation" of documents after a search.[19]

Significantly, the panel majority's interpretation of HUD's response to the Priselac FOIA Request, as resulting in an administrative "report" or "investigation" for purposes of § 3730(e)(4)(A), is tantamount to reinstating the government knowledge bar Congress intended to eliminate in the 1986 amendments to the Act. *See* Part I, *supra*. Under that interpretation, § 3730(e)(4)(A) would be triggered whenever any materials possessed by the United States come into the possession of a relator through the FOIA, regardless of whether the relator was acting parasitically or whether the United States understood the significance of the information it possessed. *See also* Grassley/Berman Letter, 145 Cong. Rec. at E1546-1547 (criticizing broad judicial interpretations of the "public disclosure" items enumerated in § 3730(e)(4)(A)) (Appendix F, at 98a-110a).

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[19] In distinction to a "report," a "collection" or "compilation" is ordinarily thought of as a simple selection or arrangement of materials authored or produced by some other party. *See* Black's Law Dictionary 263-64, 284 (6th ed. 1990); 1 Bouvier's Law Dictionary 573 (1914); The Compact Oxford English Dictionary 286-87, 301 (2d ed. 1991); Webster's New Collegiate Dictionary 218, 228 (1981).

IV. The Third Circuit Opinion Eviscerates the "Original Source" Provision of the Act and Defeats the Congressional Intent Behind § 3730(e)(4), in Further Conflict With Other Courts of Appeals

According to the panel majority, Mistick cannot qualify as an original source under § 3730(e)(4)(B) because it gained its knowledge of the misrepresented facts (X) through a § 3730(e)(4)(A) public disclosure, *i.e.*, the response to the Priselac FOIA Request. *See Mistick*, 186 F.3d at 388-389 (Appendix A, at 27a-28a). Yet the panel majority's approach to the statute is entirely circular -- the very same thing that is said to make § 3730(e)(4)(A) initially applicable to Mistick is then *also* used to deny Mistick the original source safe harbor or exception of § 3730(e)(4)(B).

The panel majority has rendered either paragraph (A) or (B) of § 3730(e)(4) superfluous. The panel majority's broad, non-plain language interpretation of "based upon" may prevent parasitic suits, but does so at the expense of *also* barring the non-parasitic suits that Congress specifically intended to encourage in 1986. *See* Part I, *supra*. Congressional intent might be addressed through a proper interpretation of the "original source" provision.[20]

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[20] In their recent letter to the Attorney General, Senator Grassley and Congressman Berman specifically emphasize that Congress intended the 1986 amendments to encourage non-parasitic private relator suits. *See* Grassley/Berman Letter, 145 Cong. Rec. at E1546-1547 (Appendix F at 98a, 110a).

In other circuits that have adopted the panel's broad view of the term "based upon," the original source provision nevertheless has been interpreted to effectuate Congressional intent. *See, e.g., Springfield*, 14 F.3d at 657 (relator is original source where it has direct and independent knowledge of any essential element, X or Y). In fact, as pointed out by Chief Judge Becker in his *Mistick* dissent, the panel majority's treatment of the original source provision is inconsistent in this regard with the Third Circuit's own precedent. *See Mistick*, 186 F.3d at 399 (Becker, C.J., dissenting) (discussing *Stinson*) (Appendix A, at 53a); *Stinson*, 944 F.2d at 1160 (relator is original source so long as it has direct and independent knowledge of "substantive information about the particular fraud"). The Ninth Circuit specifically has held that a relator still qualifies as an original source where the relator itself caused the supposed "public disclosure" of the fraud. *Lockheed Missiles & Space Co.*, 190 F.3d at 970; *see also* Grassley/Berman Letter, 145 Cong. Rec. at E1546-1547 (original source provision should be available to relators combining their own experience with information obtained from a FOIA request or other public documents).

By ignoring that Mistick itself brought Respondents' false statements to light through the Priselac FOIA Request, and that the United States did not know those statements to be false until Mistick explained the circumstances, the panel majority's interpretation of the original source provision effectively reinstates the pre-1986 government knowledge bar, under which a relator could not maintain a suit even though it was the relator that had disclosed the fraud to the United States in the first place. *See* Part I, *supra*; *Mistick*, 123 F.3d at 400 (Becker, C.J., dissenting) (Appendix A, at 55a).

CONCLUSION

For all the foregoing reasons, this Court should grant Mistick's Petition for Writ of Certiorari.

Respectfully submitted,

JOHN E. BEARD, III *(Counsel of Record)*
PETER N. FLOCOS
Counsel for Petitioner

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